in the

Supreme Court

of the

United States

OCTOBER TERM, 1973

No. 73-853

SUSAN JILL FORBICETTA

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, SUSAN JILL FORBICETTA, prays that a Writ of Certiorari issue to review the opinion and decision of the United States Court of Appeals for the Fifth Circuit entered on September 19, 1973, and denial of Petition for Rehearing entered on November 2, 1973.

OPINIONS BELOW

The opinion and decision of the Court of Appeals is not yet reported. A copy of the opinion is attached hereto as Appendix "A". A copy of the Judgment is attached hereto as Appendix "B". A copy of the Order denying Petition for Rehearing is attached as Appendix "D". The Order Granting Stay of Mandate is attached as Appendix "F".

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit, which is sought to be reviewed, was entered September 19, 1973, that Court entering a further order on November 2, 1973, denying Petition for Rehearing. The present Petition for Writ of Certiorari is being filed within thirty (30) days of that order.

Petitioner invokes the jurisdiction of this Court under Title 28, Section 1254 (1).

QUESTIONS PRESENTED

I

SHOULD THE DECISION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, INVOLVING A BORDER "STRIP SEARCH", BE REVIEWED, WHERE THE OPINION AND DECISION DEPARTS FROM ESTABLISHED CASE LAW INVOLVING BORDER "STRIP SEARCHES" AND IS IN DIRECT CONFLICT WITH OPINIONS AND DECISIONS OF ANOTHER UNITED STATES COURT OF APPEALS?

II

SHOULD THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, INVOLVING A PRE-TRIAL STIPULATION WHICH WAS NOT KEPT BY THE PROSECUTOR, BE REVIEWED, WHERE THE DECISION DEPARTS FROM AND IS IN CONFLICT WITH, A DECISION OF THE UNITED STATES SUPREME COURT?

III

SHOULD THE SUPREME COURT EXERCISE ITS POWER OF SUPERVISION WHERE THE FIFTH CIRCUIT HAS SO FAR SANCTIONED THE TRIAL COURT'S OPEN HOSTILITY AND PREJUDICIAL BIAS AND DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS?

STATEMENT OF THE CASE

The Petitioner had been charged by a two count Indictment, Count I charging that the Defendant knowingly, intentionally and unlawfully imported into the United States in violation of Title 21 U.S.C. Sec. 952 (a) and Count II charged, that the defendant knowingly, intentionally and unlawfully possessed with intent to distribute cocaine in violation of Title 21 U.S.C. Sec. 841 (a) (1).

The Petitioner, among other Motions, filed a Motion to Suppress, which Motion was denied.

The prosecutor and defense counsel entered into a written pre-trial Stipulation Agreement, providing, among other things, that Petitioner would waive Jury Trial and proceed without a jury; that the chemist would not have to come down from Georgia to testify that the contraband was cocaine; that the testimony from the Motion to Suppress would be adopted; that the Prosecutor would recommend $2,500 surety bond pending Appeal and a sentence of two years, if the Petitioner was found guilty.

The prosecutor utilized the Stipulation to waive jury and adopt testimony from the Motion to Suppress and to introduce evidence without the chemist, per the stipulation.

At the time of sentencing, a different prosecutor appeared and would not honor the Stipulation Agreement. When defense counsel tried to apprise the Court of the Stipulation Agreement, the Court held defense counsel in contempt, fined him One Hundred ($100.00) Dollars, called him a liar, said he was unfit to practice law here and he was removed from the Court Room by the United States Marshal.

The United States Circuit Court of Appeals for the Fifth Circuit in affirming the Trial Court Judgment, rendered an opinion and decision in direct conflict with previous decisions of the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court. A Motion for Rehearing was denied. A Motion to Stay Mandate was granted. This Petition for Certiorari ensued.

REASONS FOR GRANTING THE WRIT

I

THE OPINION AND DECISION BY THE TRIAL COURT AND THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, ARE IN OPEN AND DIRECT CONFLICT WITH OPINIONS AND DECISIONS OF THIS COURT AND THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

The instant case involves a "strip search" at Miami International Airport wherein the petitioner was singled out, removed to a private examination room and "strip searched".

The United States Court of Appeals, for the Ninth Circuit, has clearly and concisely set forth the standard for "strip searches" at an international border in the following line of cases: *Henderson v. United States,* 390 F.2d 805, 808 (1967); *United States v. Guadalupa-Garza,* 421 F.2d 876 (1970); *United States v. Johnson,* 425 F.2d 630 (1970), rehearing denied June 22, 1970, Certiorari granted 91 S.Ct. 2294, Certiorari dismissed 92 S.Ct. 38; *United States v. Shields,* 453 F.2d 1235 (1972) and *United States v. Gilda-Avila,* 468 F.2d 184 (1972). In *United States v. Johnson,* supra, this Court, after exhaustive oral examination, 9 Cr L 4023, *U.S. v. Johnson,* No. 577 argued 4/19/71, dismissed the Government's Petition for Writ of Certiorari.

In the instant case, the United States Court of Appeals, Fifth Circuit, in affirming the trial court, disre-

garded and departed from the standard set forth in the foregoing line of cases. Their affirming opinion cites recent cases involving baggage searches at domestic air terminals and has nothing whatsoever to do with "strip searches" of a person at an international border.

This direct conflict of opinions and decisions between the United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the Ninth Circuit should be settled by this Court.

II

THE OPINION AND DECISION OF THE TRIAL COURT AND THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, IS IN DIRECT CONFLICT WITH THE UNITED STATES SUPREME COURT OPINION AND DECISION IN *SANTABELLO v. NEW YORK*, 404 U.S. 257 (1971).

In the instant case a written pre-trial stipulation was entered into between the prosecution and the defense. The prosecution utilized this agreement to their advantage and to the detriment of the defendant. This agreement was honored by the defense but was not kept by the prosecutor.

The United States Supreme Court in *Santabello v. New York*, supra, at page 267 stated:

> "Where the 'plea bargain' is not kept by the prosecutor, the sentence *must be vacated.*" (emphasis added).

The opinion and decision in the instant case departs from and is in conflict with this Court and should be reviewed.

III

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS SO FAR SANCTIONED THE TRIAL COURT'S DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURE AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Trial Judge was openly hostile and prejudicially biased against the defendant and defense counsel throughout these proceedings and sentencing. A brief review of the record makes this fact abundantly clear. Defense Counsel, an officer of the Court, was continually badgered, unnerved, belittled, accused and threatened by the Trial Judge.

The Trial Judge, for no cause whatsoever, among other things:

1. Called Defense Counsel a liar.
2. Stated he was unfit to practice law here.
3. Threatened him with investigation.
4. Held him in Contempt.
5. Fined him $100.00, thereby causing Defense

> Counsel to be removed from the Court Room by the United States Marshal.

In the case of *Knapp v. Kinsey*, 232 F.2d 458 (1956) the Circuit Court of Appeals, Sixth Circuit stated:

> "In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L.Ed. 942, the Supreme Court said 'Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.' In Whitaker v. McLean, 73 App. D.C. 259, 118 F.2d 596 the Court said — *'Hostility is a form of bias . . .'* The policy . . . is that the courts of the United States 'shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial'; i.e. shall appear to be impartial." (Emphasis added)

In the instant case we find a record that is replete with the trial court's prejudicially biased actions and statements toward the defendant's counsel.

This departure from accepted and usual court of judicial proceedings, so far sanctioned by the United States Court of Appeals for the Fifth Circuit, calls for this Court to exercise its power of supervision to correct the Trial Judge's departure from and disregard of accepted and usual judicial proceedings.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JACK FREED, attorney for Petitioner, hereby certify that I have this 30th day of November, 1973, served by Air Mail three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit as follows:

1. On the United States Attorney, by hand delivering three printed copies thereof to the office of Robert Rust, United States Attorney for the Southern District of Florida, at 14 N.E. First Avenue, Suite 300 Ainsley Building, Miami, Florida 33132, and by hand delivering three printed copies to the Solicitor General, Department of Justice, Washington, D.C. 20530.

/s/ Jack Freed
JACK FREED